

**Rosehill Cemetery Association and Cemetery Workers and Greens attendants Union, Local 365, Service Employees International Union, AFL-CIO, Petitioner. Case 22-RC-8643**

July 26, 1982

**DECISION AND DIRECTION**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND ZIMMERMAN

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objections and challenges to an election held on November 6, 1981,<sup>1</sup> and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations<sup>2</sup> to the extent consistent herewith.

On October 27, 1981, at an informal conference held at the Board's Newark Regional Office, the parties orally agreed to exclude interment supervisors from the bargaining unit. At that time, the Employer identified Nicholas McKluskey and Manuel Luiz as its interment supervisors. The Petitioner asserts that, after this conference but before the election, it learned that Luiz was a machine operator, not an interment supervisor, and therefore he was eligible to vote.

The Regional Director held that the parties intended to exclude all interment supervisors from the unit and that the parties orally agreed that Luiz was an interment supervisor. The Regional Director, citing *Banner Bedding, Inc.*, 214 NLRB 1013 (1974), held the Petitioner to this oral stipulation and recommended that the challenge to Manuel

Luiz' ballot be sustained. The Petitioner excepted to this finding, and we find merit in this exception.

The Board's well-established rule is that only where the parties enter into a written and signed agreement which expressly provides that issues of eligibility resolved by it shall be final and binding upon the parties will we consider such an agreement a final determination of the eligibility issues treated in the agreement, unless the agreement is in whole or in part contrary to the Act or our established policy. *Norris-Thermador Corporation*, 119 NLRB 1301, 1301-02 (1958). *Banner Bedding, Inc.*, *supra*, relied on by the Regional Director here, established a limited exception to the *Norris-Thermador* rule. In *Banner Bedding*, an oral preelection stipulation excluded a regular part-time employee from the unit. Both parties in that case admitted the existence of the oral agreement and it was clear that, but for the oral agreement, the parties were prepared to proceed to a hearing on the eligibility issue and would not have signed the consent election stipulation. We found that in such a situation such an agreement did not contravene any Board policy or statutory proscription and we upheld the employee's exclusion from the unit. *Id.* at 1014. We were careful to note, however, that *Banner Bedding* did not present the issue of whether the Board would honor preelection agreements concerning the statutory eligibility of employees. *Id.* at 1013, footnote 2.

Subsequently, we held that *Banner Bedding* cannot be read as allowing oral stipulations to preclude challenges to ballots based on a statutory exclusion, *Esten Dyeing & Finishing Co., Inc.*, 219 NLRB 286, 287 (1975), and recently we stated that we will not be bound by parties' stipulations on issues of supervisory status, *A & B Cartage*, 256 NLRB 14 (1981). The Petitioner here contends that Manuel Luiz is not a supervisor. Because the Petitioner raises a statutory question, the parties' stipulation does not bind us and the narrow *Banner Bedding* exception does not apply. Contrary to the Employer's contention, the statutory issue is raised for our resolution by stipulations, like the instant one, that exclude alleged supervisors from the unit as well as by those which include them. See *NET Television, Inc., a wholly owned subsidiary of Educational Broadcasting Corporation*, 252 NLRB 640, 641 (1980). We therefore reject the Regional Director's recommendation that we sustain the challenge to Manuel Luiz' ballot and direct that a hearing be held on the question of his supervisory status. Since our disposition of Luiz' ballot could make the ballot of Jose Elvir determinative of the elec-

<sup>1</sup> The Regional Director conducted the election pursuant to a Stipulation for Certification Upon Consent Election. The tally was 5 for, and 6 against, the Petitioner; there were 3 challenged ballots, a sufficient number to affect the results.

<sup>2</sup> The Regional Director recommended that a hearing be held on additional objectionable conduct he uncovered in the course of his investigation. The Employer excepts to the direction of a hearing and argues that we should overrule our longstanding policy, restated in *American Safety Equipment Corporation*, 234 NLRB 501 (1978), that permits regional directors to investigate and act upon findings of election interference even though these findings are not encompassed within the objections filed by the parties. The Employer also moves for a stay of the hearing and, in the event the stay is denied, for a more specific statement of the objectionable conduct. We decline to follow the Employer's urgings and deny its motions.

Chairman Van de Water would not consider conduct which has not been specifically and timely alleged to be objectionable, in accord with the position set forth in the dissent in *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978).

In the absence of exceptions, we adopt, *pro forma*, the Regional Director's recommendation that the challenge to the ballot of Jeffrey Schnarr be sustained.

tion results, we also direct that the hearing include consideration of Elvir's status.<sup>3</sup>

#### DIRECTION

It is hereby directed that a hearing be held before a hearing officer, to be designated by the Regional Director for Region 22, for the purpose of taking evidence with respect to the additional objectionable conduct discovered by the Regional Director during his investigation of the parties' objections, and with respect to the issues of whether Manuel Luiz is a supervisor and whether Jose Elvir is a supervisor and/or managerial employee.

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<sup>3</sup> The Regional Director found that the question of Jose Elvir's status could best be resolved on the basis of record testimony at a hearing. However, because his disposition of the ballots of Jeffrey Schnarr and Manuel Luiz rendered Elvir's ballot nondeterminative of the election results, the Regional Director recommended that Elvir's ballot remain unopened and uncounted.

The designated hearing officer shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of the issues. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon filing such exceptions, the parties filing same shall serve a copy on the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER DIRECTED that the case be remanded to the Regional Director for the aforementioned purposes, including the conduct of a hearing, and the Regional Director is hereby authorized to issue notice thereof.